UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2008-1354

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT (GCBSID) and WILLIAMSON LAND COMPANY,

Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF RECLAMATION, KEN SALAZAR, Secretary of the Interior, ROBERT W. JOHNSON, in his capacity as Commissioner of the Bureau of Reclamation, J. WILLIAM MCDONALD, in his individual capacity, and J. WILLIAM MCDONALD, in his capacity as Regional Director of the Pacific Northwest Region of the Bureau of Reclamation,

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Washington in case no. 06-CV-204, Chief Judge Robert H. Whaley.

DECIDED: September 2, 2009

Before SCHALL, BRYSON, and LINN, Circuit Judges.

BRYSON, Circuit Judge.

I

In 1937, Congress authorized a multipurpose reclamation project known as the Columbia Basin project, which was designed to irrigate farmland in central Washington with water drawn from the Columbia River. Over time, water that seeped into the ground from the surface irrigation created significant quantities of artificially stored groundwater in the Quincy Basin area. The Washington Department of Ecology began managing the Quincy Basin groundwater in 1973 but later accepted the federal government's claim to ownership of that water. *See Flint v. United States*, 906 F.2d 471, 473-74 (9th Cir. 1990); *Jensen v. Wash. Dep't of Ecology*, 102 Wash.2d 109, 685 P.2d 1068, 1070 (1984). The Bureau of Reclamation, an agency within the United States Department of the Interior, subsequently issued a standard form contract authorizing private landowners to use the Quincy groundwater. The contracts were executed under the authority of section 9(e) of the Reclamation Project Act of 1939 ("the 1939 Act"), Pub. L. No. 76-260, 53 Stat. 1187, codified at 43 U.S.C. § 485h(e). Since 1975, the withdrawal of Quincy groundwater by private landowners has been conditioned on the execution of the Bureau's section 9(e) contract and on

the receipt of a state permit from the Washington Department of Ecology.

There are currently 292 landowners in the Quincy Basin that have entered into a water supply agreement with the Bureau of Reclamation. They include the Williamson Land Company ("Williamson") and the members of the Grant County Black Sands Irrigation District ("GCBSID"). In consideration for a "license to withdraw and use its artificially stored ground water," the Bureau charges the landowners an annual "[p]ayment for water" consisting of a variable charge for operation and maintenance, and a fixed charge of $1.70 per acre "for participation in Project construction repayment." The Bureau's standard form contract also states that the license "shall continue for a period of 10 years" and "shall be extended ... for an additional like period without further notice provided the State permit ... has been extended for a similar period."

Initially, the Washington state permits issued to the Quincy groundwater users had 10-year terms. In 1983, the Washington Department of Ecology eliminated the 10-year term limitation. The state permits are now automatically renewed subject only to the Department's authority to modify or terminate the permits "at any time for good cause." Wash. Admin. Code 173-134A-080(2)(i) (2009); *see also* Wash. Rev. Code. § 90.40.100 (2009). While the landowners' contracts with the Bureau have been renewed several times, the material terms and provisions of the current contracts are identical in all respects to the standard form water service contract promulgated by the Bureau in 1975.

In July 2006, the appellants brought this suit as a class action in the United States District Court for the Eastern District of Washington. The action was brought on behalf of all landowners located within the GCBSID that hold water service contracts for the withdrawal of Quincy groundwater. The complaint sought injunctive and monetary relief against the Bureau of Reclamation. The appellants' theory of the case was that they were entitled to the statutory benefits accorded to holders of "repayment contracts" and "long-term water service contracts" under reclamation law. The appellants filed two motions for partial summary judgment, and the government filed a motion to dismiss the complaint for lack of subject matter jurisdiction or, in the alternative, to render judgment on the pleadings.

The district court rejected the appellants' statutory theory and dismissed the complaint. The court canvassed the statutory provisions cited in the parties' briefs and concluded that the contracts at issue are "short-term water service contracts," not "repayment contracts" or "long-term water service contracts," and that the appellants are not entitled to the same statutory benefits accorded to holders of the latter two types of contracts. The court denied the appellants' motions for summary judgment as moot. *Grant County Black Sands Irrigation Dist. v. United States*, 539 F. Supp. 2d 1292, 1298-99 (E.D. Wash. 2008).[1] The appellants then took this appeal.

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[1] Although the district court's analysis is largely directed at demonstrating why the appellants' claims fail on the merits, the

II

At the outset, the parties disagree about whether this court has jurisdiction over the appeal. The appellants argue that their claim for $10,000 in damages constituted a claim under the "Little Tucker Act," 28 U.S.C. § 1346(a)(2). Because the jurisdiction of the district court was based in part on that Act, the appellants submit that this court has appellate jurisdiction under 28 U.S.C. § 1295(a)(2). The government responds that in substance this is an

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court at one point stated that because the plaintiffs had "failed to establish a claim under the APA, they are not entitled to an APA waiver of sovereign immunity." Based on that language in the district court's order, the government argues that the court dismissed the complaint for want of jurisdiction. In fact, the court's order is more properly characterized as a dismissal on the merits. The complaint set forth statute-based claims that, if accepted, would have justified relief either in the form of damages or an order affecting the parties' rights under their contracts, or both. That was sufficient to confer jurisdiction on the district court. *See Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 21 n.6, 102 S.Ct. 2202, 72 L. Ed. 2d 639 (1982); *Bell v. Hood*, 327 U.S. 678, 680-81, 66 S.Ct. 773, 90 L.Ed. 939 (1946). The government's argument that the district court had no jurisdiction under the APA focuses on the merits of the appellants' statutory claims and is predicated on the erroneous notion that a court does not have jurisdiction to address a claim that is incorrect on the merits. Accordingly, to the extent that it may be pertinent in any future proceedings, we treat the dismissal as having been on the merits rather than on jurisdictional grounds. *See Lewis v. United States*, 70 F.3d 597, 604 (Fed. Cir. 1995).

appeal from the denial of a request for equitable relief and that the jurisdiction of the district court was invoked under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq., not the Little Tucker Act. For that reason, the government contends, appellate jurisdiction lies in the Ninth Circuit, not in this court.

It is certainly true that much of the relief sought by the appellants was equitable in nature. However, this court has jurisdiction over an appeal as long as the jurisdiction of the district court was based "in whole or in part" on the Little Tucker Act. *Wopsock v. Natchees*, 454 F.3d 1327, 1331 (Fed. Cir. 2006). The question for us is not whether the main thrust of the action in the district court was equitable, but whether the district court's jurisdiction was based, even in part, on section 1346(a)(2). The complaint listed the Little Tucker Act as one of the bases for the district court's jurisdiction and sought "specific monetary relief for illegal overcharges imposed on them by the Bureau of Reclamation." We therefore focus on the appellants' allegations with respect to the water use charges assessed by the Bureau of Reclamation.

The appellants' theory of the case proceeded from the premise that the contracts of the landowners they represent are not contracts to purchase water, but contracts to repay the federal government for their share of the construction costs of the irrigation projects. Both in the complaint and in various pleadings before the district court, the appellants cited a number of statutory provisions and court decisions as support for the proposition that any

administrative overcharges assessed by the Bureau of Reclamation must be credited toward that repayment obligation or be refunded to the landowners. The complaint alleged that the Bureau of Reclamation had overcharged the landowners for the operation and maintenance of the irrigation works and that if those excess charges had been properly credited to repayment, the landowners' contractual payment obligations would have ended several years ago. The "monetary relief" sought by the appellants was a refund of the alleged overcharges for operation and maintenance, or alternatively a credit in the amount of the alleged excess charges toward the landowners' repayment obligation. In that regard, the prayer for relief included a request for judgment that the landowners are entitled to "receive an aggregate total sum of $10,000 in damages against the United States for the ... advance collection of administrative charges for administration of the Quincy Ground Water Subarea Artificially Stored Ground Water Program from the Plaintiff class."[2]

That theory of relief in effect seeks damages for an unlawful exaction. *See United States v. Testan*, 424 U.S. 392, 401-02, 96 S.Ct. 948, 47 L. Ed. 2d 114

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[2] One of the statutory benefits claimed by the appellants was the right to operate and manage the irrigation works through a water users' association or an irrigation district, such as the GCBSID. *See, e.g.*, 43 U.S.C. §§ 498-501. Thus, the complaint further specified that the $10,000 award shall be "in the form of payment to GCBSID ... in the year in which the GCBSID takes over the administration and management of the program."

(1976); *Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005); *Telecare Corp. v. Leavitt*, 409 F.3d 1345, 1348 (Fed. Cir. 2005); *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1582-73 (Fed. Cir. 1996). Under that theory, the trial court had Little Tucker Act jurisdiction because if the appellants' theory of the case were accepted on the merits, the relief to which the landowners would be entitled would include up to $10,000 in damages by way of a refund of previous administrative overcharges. *See, e.g., Brazos Elec. Power Co-op., Inc. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998) ("Whether this refund is paid directly ... or whether it is credited towards other money ... owe[d] to the federal government is irrelevant to our analysis.").

Notwithstanding the reference to the Little Tucker Act in the complaint, the government argues that the appellants waived that claim. It is true, as the government contends, that the appellants' response to the government's motion to dismiss in the district court contained no express reference to the Little Tucker Act. But because the district court's jurisdiction could readily be sustained on other grounds, such as the APA, it is not surprising that the appellants focused their attention on those other grounds for opposing the motion to dismiss. In an effort to preserve their APA claim before the district court, the appellants argued that the limitations on equitable remedies under the Tucker Act precluded complete and adequate relief in the Court of Federal Claims. *See, e.g., Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 200-02 (Fed. Cir. 1997). By emphasizing the equitable relief sought in the

complaint, however, the appellants did not waive their claim to a refund under the Little Tucker Act. They made clear that even if the district court were to dismiss the APA claim, the action would survive "at least as to that part of the Plaintiffs' claims which seeks refund of overcollections assessed against them by BOR." Moreover, the appellants' filings in the district court further demonstrate that they did not abandon their Little Tucker Act claim; in a pleading filed pursuant to the district court's scheduling order, the appellants asserted that they "have made a Little Tucker Act Claim," citing the paragraph in the complaint seeking $10,000 in damages for administrative overcharges that they claim the landowners should not have had to pay. Because the jurisdiction of the district court was based at least in part on the Little Tucker Act and because the appellants did not waive their Little Tucker Act claim in the district court, we have jurisdiction over this appeal.

III

On the merits, the central issue in this appeal is whether the Secretary of the Interior committed legal error in denying the appellants the statutory benefits that are accorded to holders of "repayment contracts" and "long-term" water service contracts. The appellants present three grounds for compelling the Secretary to grant them those benefits: (1) their contracts are "long-term" water service contracts, within the meaning of section 9(e) of the 1939 Act, and they are entitled to the statutory benefits

accorded to holders of such contracts; (2) their contracts are "repayment contracts," as defined in section 2(e) of the 1939 Act, 43 U.S.C. § 485a(e), and they are entitled to the statutory benefits accorded to holders of such contracts; and (3) the Secretary, acting through the Bureau of Reclamation, has already granted the appellants the benefits due to holders of repayment and long-term water service contracts, and cannot now revoke those benefits. Before we address the merits of those arguments, we briefly review the general principles of reclamation law and the different types of contracts for the delivery of project water.

Modern reclamation law has its roots in the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, as amended, 43 U.S.C. §§ 371 et seq., which laid the groundwork for a vast and ambitious federal program to irrigate the arid lands of the western states. Under the 1902 Act, the Secretary of the Interior was charged with building dams, canals, and other irrigation facilities to be financed through the sale of federally owned lands. 43 U.S.C. §§ 391, 411. It was expected that the owners of the newly irrigated lands would repay their share of the construction costs of the reclamation projects over a 10-year period. Reclamation Act of 1902, § 4, 32 Stat. 388, 389 (current version at 43 U.S.C. §§ 419, 461). The operation and maintenance costs of the projects, however, were to be the responsibility of the federal government until such time as the construction payments had been made for the major portion of the lands irrigated by the projects, at which point the

management and operation of the projects would pass to the landowners. 43 U.S.C. § 498.

It soon became clear that the landowners' repayment obligations far exceeded their ability to pay. Congress therefore extended the repayment period to 20 years in 1914 and to 40 years in 1926. 43 U.S.C. §§ 423e, 475; see S.T. Harding, *Background of California Water & Power Problems*, 38 Cal. L. Rev. 547, 557 (1950). In light of the repayment extensions, Congress required the landowners to reimburse the federal government for their share of the annual operation and maintenance costs of the projects. 43 U.S.C. §§ 492, 493. The Secretary of the Interior, however, was granted discretionary authority to transfer the operation and maintenance of all or any part of the irrigation project works to a water users' association or an irrigation district. *Id.* § 499.

In the wake of the Great Depression, as landowners became increasingly unable to meet their repayment obligations, Congress enacted the Reclamation Project Act of 1939. The goal of the 1939 legislation was to restructure the landowners' repayment obligations on the basis of ability to pay, while still protecting the federal government's financial investment in the reclamation projects. *See* 43 U.S.C. § 485. To that end, the 1939 Act addressed the Secretary's contracting authority in two respects that are of particular relevance to this appeal.

First, in section 9(d) of the 1939 Act Congress authorized the Secretary of the Interior to enter into the classic repayment-type contract contemplated by the 1902 Act. Such contracts, typically called "9(d)

contracts," were made available only to irrigation districts, water users' associations, and other organizations "satisfactory in form and powers to the Secretary." 43 U.S.C. § 485h(d). Under a 9(d) contract, the organization would receive project water in exchange for assuming a "general repayment obligation," which had to be repaid "over a period of not more than 40 years." *Id.* § 485h(d)(3). The repayment obligation was defined in the 1939 Act as that "part of the construction costs allocated by the Secretary" to the organization. *Id.* § 485h(d)(2). Thus, the 9(d) contract was in form and substance a straightforward application of the repayment principle that governed reclamation law prior to the 1939 Act.

Second, in section 9(e) of the 1939 Act Congress created a new source of contracting authority for the Secretary, known as a "9(e) contract." Section 9(e) provided that, "[i]n lieu of entering into a repayment contract pursuant to the provisions of subsection (d)," the Secretary had discretion to enter into "either short- or long-term contracts to furnish water for irrigation purposes." The water supplied under 9(e) contracts was supposed to be provided "at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." Although 9(e) contracts were described as either "short-term" or "long-term," the 1939 Act did not define those terms or indicate that any legal consequences would turn on the "short-term/long-term" distinction. 43 U.S.C. § 485h(e).

The principal difference between 9(d) and 9(e) contracts under the 1939 Act was that under a 9(d) contract, the irrigation district or water users' association assumed an obligation to repay the construction costs of the project works in fixed annual installments over a predetermined period of time. By contrast, a 9(e) contract was merely a contract to receive project water at an annual rate set by the Secretary. The 9(e) contract was also more limited in its application than a 9(d) contract, because the Secretary was statutorily prohibited from using a 9(e) contract to charge landowners for the fixed costs of "irrigation water distribution works," such as canals and laterals. *See* Alfred R. Golze, *Reclamation in the United States* 107 (1961) (section 9(e) applies to "water supply works," such as dams and reservoirs); Arthur A. Maass, *Administering the CVP*, 38 Cal. L. Rev. 666, 672 (1950); Bureau of Reclamation, Dep't of the Interior, *Repayment of Reclamation Projects* xiii, xli, xlii (1972); *see also Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 286-87, 78 S.Ct. 1174, 2 L. Ed. 2d 1313 (1958).

The legislative history of the 1939 Act does not provide a clear account of Congress's reasons for authorizing the Secretary of the Interior to enter into 9(e) contracts. Although the committee reports on the 1939 Act indicate that Congress was generally focused on "introducing flexibility into the contracts under which water users repay to the Government the cost of construction of Federal reclamation projects," there is little by way of explanation for why Congress thought section 9(e) was necessary to accomplish that goal. H.R. Rep. No. 76-995, at 1

(1939); S. Rep. No. 76-758, at 1 (1939). The 1939 Act was based in part on the findings of a special commission charged with studying the factors and conditions affecting the repayment of construction charges. *See* H.R. Rep. No. 76-995, at 2 (1939). One of the commission's recommendations was that "water should be delivered on a rental basis" to certain specified projects for which the landowners were unable to pay even the operation and maintenance costs. H.R. Doc. No. 75-673, at 20, 38 (1938). It may be that Congress decided to adopt the commission's recommendation for a broad class of reclamation projects, such as dams, reservoirs, and other large-scale works for which the landowners could not be expected to repay the construction costs.

In part, section 9(e) codified the Bureau of Reclamation's pre-existing practice of taking a "water rental" approach when the total costs of the project could not be determined until after the project had been completed. *See* Harry P. Glassman, The *Validity of the 9(e) Contract*, 38 Cal. L. Rev. 739, 741 n.9 (1950); *see also* H.R. Doc. No. 75-673, at 11 (1938). Several commentators suggested, however, that the introduction of 9(e) contracts constituted a departure from the repayment model insofar as the new contracts permitted the federal government to take on the role of a public utility, rather than a contractor of last resort for reclamation projects. *See* Harding, *supra*, at 569 ("Under the 9e contract the Bureau of Reclamation becomes a public utility selling service instead of a construction agency selling constructed projects to their users."); Roy E. Huffman, *Irrigation Development & Public Water Policy* 93 (1953) ("This

type of contract places the Bureau of Reclamation very much in the category of a public utility."); Maass, *supra*, at 671 (holders of 9(e) contracts essentially "purchase a utility service in the same sense that a citizen anywhere purchases electric power at an agreed rate"); *see also* S.V. Ciriacy-Wantrup, *Natural Resource Economics* 189-192 (1985); Glassman, *supra*, at 739-45; Water Res. Policy Comm'n, *Ten Rivers in America's Future* 248-49 (1950).

Whatever the reasons for Congress's decision to authorize 9(e) contracts, the Bureau of Reclamation soon began entering into 9(e) contracts in connection with a number of existing and newly constructed reclamation projects. Irrigation districts and landowners, particularly in the San Joaquin Valley of California, vigorously contested the use of such utility-type contracts, arguing that the Bureau of Reclamation was not authorized to enter into water rental contracts. *See* Sheridan Downey, *They Would Rule the Valley* 243 (1947). The Bureau of Reclamation also encountered considerable resistance to its standard form water rental contracts, which did not guarantee any permanent water rights or grant any credit toward repayment of the construction costs of the project. *See* Ciriacy-Wantrup, *supra*, at 189-192; Downey, *supra,* at 226-29, 243-46; Huffman, *supra,* at 93; Raymond Moley, *What Price Federal Reclamation?* 20-22 (1955); Robert de Roos, *The Thirsty Land* 154-58 (1948).

In 1956, Congress took up the landowners' cause and supplemented sections 9(d) and 9(e) of the 1939 Act. *See* Pub. L. No. 84-643, 70 Stat. 483 (1956)

(codified at 43 U.S.C. §§ 485h-1 to 485h-6). It did so principally by conferring new benefits on holders of "long-term" 9(e) contracts, which were defined as 9(e) contracts having a term of more than 10 years. 43 U.S.C. § 485h-3. Those benefits included (1) the right to renew the contract on "terms and conditions mutually agreeable to the parties," (2) the right to convert the contract into "a contract under [section 9(d)]," and (3) the right to cease paying the "construction component" of the total use charge when the payments in excess of the government's operation and maintenance charges equaled the construction cost of the project. *Id.* § 485h-1. Thus, although the "short-term/long-term" distinction predated the 1956 legislation, Congress for the first time added meaning to that distinction. Significantly, the 1956 Act contained no reference to extending benefits to short-term 9(e) contracts similar to those that were extended to long-term 9(e) contracts.

As the committee reports on the 1956 Act make clear, the purpose of the legislation was to address the landowners' concerns

> (1) that no assurance can be given in the contract itself or in any other document binding upon the Government that the contract will be renewed upon its expiration; (2) that the water users who have this type of contract are not assured that they will be relieved of payment of construction charges after the Government has recovered its entire irrigation investment; and (3) that the water users are not assured of a "permanent right"

> to the use of water under this type of contract.

S. Rep. No. 84-2241, at 2 (1956); H.R. Rep. No. 84-1754, at 2 (1956); *see also Ivanhoe*, 357 U.S. at 297-98, 78 S.Ct. 1174 (the 1956 Act "answered most of the objections lodged against" the requirements of section 9(e) of the 1939 Act). It was equally clear, however, that Congress did not intend for the 1956 legislation to repudiate the Bureau of Reclamation's general view that the "so-called water service or utility type contracts as authorized by the Reclamation Project Act of 1939 represented an innovation in reclamation law." S. Rep. No. 84-2241, at 2 (1956). The 1956 Act merely made it "possible for the Secretary of the Interior in approving so-called 'water service' and 'utility type' contracts to meet objections" of the landowners with respect to renewability, crediting, and permanent water rights. *Id.* Thus, 9(e) contracts continued to be treated as "water service" or "utility-type" contracts, distinct from 9(d) contracts and the repayment-type contracts envisioned by the 1902 Act. *See* 4 Robert E. Beck, *Water & Water Rights* 39-58 n.245, 39-59 n.247 (1991) ("Contracts under § 9e are not really repayment contracts, but rather water supply contracts that may take into consideration project costs, but do not purport to collect full payment in any set period of time"); Frank J. Trelease & George A. Gould, *Cases & Materials on Water Law* 697 (4th ed. 1986) (section 9(e) contracts have been "likened to the arrangement made by a public utility furnishing water to consumers"); *see also* Reed D. Benson, *Whose Water Is It? Private Rights and Public Authority Over Reclamation*

Project Water, 16 Va. Envtl. L. J. 363, 371 (1997) ("The repayment contract is analogous to a mortgage, while a water service contract is more like a lease."); Golze, *supra*, at 247, 256. With that historical and statutory context in mind, we turn to the appellants' challenges to the government's position with respect to their contract rights.

IV

We begin by addressing the narrowest of the appellants' grounds for relief, namely that the contracts at issue are long-term contracts under section 9(e) of the 1939 Act, 43 U.S.C. § 485h(e). The appellants assert that if we were to accept their characterization of the contracts as long-term contracts, they would be entitled to the renewal, conversion, and repayment credit rights set forth in the 1956 Act and codified at 43 U.S.C. § 485h-1.

As noted, a long-term contract is defined as any contract to furnish water "the term of which is more than ten years." 43 U.S.C. § 485h-3. Article 6 of the landowners' contracts states, in pertinent part:

> *TERM.* This license shall be effective on the date hereof and ... shall continue for a period of 10 years, or until the termination date of the Landowner's State permit if it is earlier, and shall be extended ... for an additional like period without further notice provided the State permit referred to in Article 3 has been extended for a similar period with a new termination date therefor....

During the initial 10-year term of their contracts, the landowners were required to pay only a percentage of the annual water user charge calculated by the Bureau of Reclamation. With respect to the amounts due after the initial 10-year term, the contracts state that "[r]enewals will be billed at 100 percent." Because the contracts "continue for a period of 10 years," albeit with the possibility of renewal, they are not, on their face, "long-term" contracts as that term is defined in section 485h-3.

A

The appellants make two arguments as to why their contracts are "contracts for more than ten years" despite the explicit 10-year term set forth in Article 6. First, they argue that the contracts are permanent and uninterruptible because the underlying state permits do not expire after a term of years. While the appellants acknowledge that the state permits may be terminated for good cause by the Washington Department of Ecology, they contend that Congress has preempted the field of reclamation law and that the state of Washington is therefore required to exercise its authority to terminate the permits in conformity with federal law. Under the appellants' theory, the good cause requirement for terminating the appellants' state permits is essentially a nullity-the circumstances justifying the termination of the permits are the same as those that would trigger a termination of the contract itself. Since the appellants contend that renewal is automatic, they regard the contracts as having a

perpetual term that is necessarily greater than 10 years.

We need not decide the precise contours of the good cause requirement under Washington law, because the appellants' argument is based on the flawed assumption that the "term" of the contracts necessarily includes any periods of renewal following the expiration of the contracts' designated duration of a "period of 10 years." That argument is contrary to the most natural meaning of the word "term," as it is used in the contracts, and it is also contrary to the parties' expressed intentions as to the matter and to the statutory and regulatory backdrop of the contractual arrangements at issue in this case.

The essence of the appellants' argument is that the "term" of the contract should be interpreted to include the renewal periods, in which case the contract "term" would be indefinite or perpetual. That interpretation is contrary to the ordinary meaning of the word "term," which is "a period of time with some definite termination." *Black's Law Dictionary* 1470 (6th ed. 1990). Moreover, interpreting the word "term" in the contract to include the renewal periods would render meaningless the "shall continue for a period of 10 years" clause in the contracts. If the parties intended to create a contractual relationship of indefinite duration, they could simply have provided that the contracts would remain in effect until either the landowners or the Bureau of Reclamation exercised their termination rights under Article 12. In order to give full effect to the parties' expressed intentions on

the matter, the contracts must be understood as limited to 10-year "terms."

The relevant provisions of the 1956 Act support the conclusion that the "term" of a 9(e) contract does not refer to the combination of the stated term and any potential renewal periods. One of the objections to the utility-type contracts under section 9(e) was that the landowner could not be assured of a stable water supply because there was no guarantee that the Bureau of Reclamation would renew the contract upon expiration. *See* S. Rep. No. 84-2241, at 2, 5 (1956); H.R. Rep. No. 84-1754, at 2, 4 (1956). Responding to that concern, Congress provided in the 1956 Act that the Secretary of the Interior shall, upon request of the private contractor, include in any long-term 9(e) contract a provision for renewal of the contract "under stated terms and conditions mutually agreeable to the parties." 43 U.S.C. § 485h-1(1). Congress also provided for long-term contract holders to receive certain water rights "during the term of the contract and of any renewal thereof." *Id.* § 485h-1(4). In distinguishing between the "term of the contract" and any subsequent periods of "renewal," that language reflects that Congress did not regard renewal periods as being included within the contract's "term" as that word was used in the statute.

Elsewhere in the 1956 Act, the word "term" is similarly used to refer to the duration of a repayment contract under section 9(d) of the 1939 Act. *See* 43 U.S.C. § 485h-1(2) ("within the term of a contract under subsection (d) of section 485h of this title"). Because the Bureau of Reclamation is generally

prohibited from entering into 9(d) contracts that do not have fixed terms, *see id.* § 485h(d)(3), the use of the word "term" in connection with 9(d) contracts is consistent with the understanding that "term" refers to a fixed and designated period of time, not an open-ended, indefinite period. *See Bankamerica Corp. v. United States*, 462 U.S. 122, 129, 103 S.Ct. 2266, 76 L. Ed. 2d 456 (1983) (the same terms in the same statute should be interpreted in conjunction with each other).

The appellants' construction of the statute also fails to accord with the joint purposes of the 1956 legislation-to provide some assurance that landowners could count on a long-term supply of water, while preserving the Secretary's flexibility to employ short-term water service contracts. Under the appellants' interpretation of the word "term" in the statute, the Bureau of Reclamation could not enter into a short-term water service contract with a renewal clause that would assure the landowner of a stable water supply for a period greater than 10 years. Such a contract, in the appellants' view, would automatically become a long-term contract convertible to a repayment contract. If that interpretation of the statute were correct, it would foreclose the Secretary from using short-term water service contracts while at the same time providing some form of assurance to the holders of such contracts that their access to water would not terminate after 10 years. In directing the Secretary of the Interior to address the concern of long-term contract holders regarding the stability of their water supply, it is unlikely that Congress intended to strip

the Secretary of any authority to provide similar assurances to holders of short-term water service contracts. We therefore hold that the word "term" in the appellants' contracts refers to the designated 10-year term set forth in the contracts and does not include any periods of renewal following that initial 10-year term.

B

The appellants' second argument for disregarding the 10-year limitation is that the word "term" in the contracts is not a reference to the contract term per se, but instead refers to the period within which the government expects to recoup its fixed costs. The annual per-acre charge paid by the appellants consists of a construction component, which remains fixed, and an operation and maintenance component, which varies from year to year. The Bureau of Reclamation calculated the annual construction component ($1.70 per acre) by amortizing the total construction cost per acre of irrigated land ($85 per acre) over a 50-year period. The appellants argue that the "term" of their contracts is 50 years because that is the period within which the government will have recovered the construction costs apportioned to the appellants.

The problem with that argument is that the appellants' contracts do not in any way tie the contract "term" to the government's recovery of construction costs. Article 6 clearly provides that the contracts "shall continue for a period of 10 years,"

with the possibility of being renewed for "additional like periods." Although the contracts set the annual construction component at $1.70 per acre, they omit any mention of the total per acre construction costs that were apportioned to the appellants. Since the contracts themselves do not admit of any method for calculating the repayment period, there is no basis for concluding that the parties intended the contract "term" to be a 50-year repayment period.

Similarly, there is no indication that Congress intended the "term" of a 9(e) contract to be equal to the number of years it would take the Bureau of Reclamation to recover its construction costs. For 9(d) contracts, the contract term is closely tied to the repayment period because the statute expressly requires the irrigation district or water users' association to assume a "general repayment obligation" that "shall be spread in annual installments ... over a period of not more than 40 years." 43 U.S.C. § 485h(d)(3). Under a 9(e) contract, by contrast, the landowner assumes liability only for a variable annual charge for the delivery of irrigation water. The only temporal limitation on 9(e) contracts to furnish water is that

> [e]ach such contract shall be for such period, not to exceed forty years, ... as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper....

Id. § 485h(e). Because there is no reference to a repayment obligation in section 9(e), the period within which the government may recover its costs is not relevant to determining the "term" of any contracts executed pursuant to that provision.

Accordingly, we conclude that the appellants' contracts are not long-term contracts within the meaning of section 485h-3 and are therefore not entitled to the benefits accorded to such contracts under section 485h-1.

V

We next turn to the appellants' theory that even if their contracts are short-term contracts, they nonetheless should be treated as "repayment contracts," as that term is used in the 1939 Act. If their contracts are repayment contracts, the appellants assert that they are entitled by statute to operate and manage the irrigation works and to receive credit toward their general repayment obligation for any past overcharges.

According to the appellants, a repayment contract is any contractual arrangement in which the United States recoups the construction costs of a reclamation project. Because the water use charges in the appellants' contracts include a construction component, the appellants argue that their contracts must be repayment contracts. More broadly, they contend that because both sections 9(d) and 9(e) direct the Secretary to set water rates in part based

on project construction costs, contracts under both sections 9(d) and 9(e) are all repayment contracts.

The first problem with the appellants' theory is that it is contrary to the very first sentence of section 9(e). That subsection begins, "In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) ... the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes." The effect of that sentence is to identify 9(d) contracts as "repayment contracts" and 9(e) contracts as water service contracts.

That straightforward reading of the statute is consistent with the legislative background. Prior to 1956, irrigation districts and landowners voiced their concern that section 9(e) seemed to be a departure from the general principle of reclamation law that landowners would acquire statutory management and water rights when the construction costs of the project had been repaid. While Congress was mindful of those concerns when it enacted the 1956 legislation, the committee reports confirmed that the "so-called water service or utility type contracts as authorized by the Reclamation Project Act of 1939 represented an innovation in reclamation law" and that "the principles of the two sections [9(d) and 9(e)] are generally accepted." S. Rep. No. 84-2241, at 2 (1956). The reports further explained that the 1956 Act was merely "directed toward perfecting the basis for the administration" of sections 9(d) and 9(e) of the 1939 Act, while "avoid[ing] any amendment to the text" of those sections. *Id.* Although Congress supplemented section 9(e) in several material

respects in the 1956 Act, it clearly did not discard the water service or utility-type contract that was embodied in that section.

The 1956 Act carefully set forth a series of statutory benefits that apply to "longterm" contracts, which are defined as contracts having a term of greater than 10 years. 43 U.S.C. §§ 485h-1 to 485h-3. In many respects, those benefits were designed to replicate the features of contracts under section 9(d) of the 1939 Act, which are clearly repayment contracts. Significantly, however, Congress did not simply relabel "long-term" contracts as "repayment contracts"; nor did it extend repayment-type benefits to holders of short-term 9(e) contracts.

Excluding 9(e) contracts from the class of "repayment contracts" is not inconsistent with the various statutory provisions cited by the appellants as support for their argument. A "repayment contract" is defined as "any contract providing for payment of construction charges to the United States." 43 U.S.C. § 485a(e). "Construction charges" are defined, in turn, as "the amounts of principal obligations, payable to the United States." *Id.* § 485a(d). The 1939 Act expressly states that 9(d) repayment contracts include a "general repayment obligation." *Id.* § 485h(d)(3). Holders of 9(e) contracts, however, are not required to assume a "general repayment obligation" or any other "principal obligation." Instead, their payments reflect "an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to

irrigation." *Id.* § 485h(e). The use of the term "fixed charges" in section 9(e), rather than "construction charges," "principal obligation," or "general repayment obligation," indicates that Congress did not intend 9(e) contracts to be classified as repayment contracts.

As we noted above, in calculating the amount of the "fixed charge," the Secretary is required to give "due consideration ... to that part of the cost of construction of works connected with water supply and allocated to irrigation." 43 U.S.C. § 485h(e). As with any utility-type contract, however, the consumer does not assume an obligation to repay the construction costs of the utility merely because the utility takes into account its fixed infrastructure costs in setting the price for its commodity service. The direction to the Secretary to account for "the cost of construction" simply reflects Congress's judgment as to the amount of revenue that ought to be generated by 9(e) contracts.

The appellants point to section 7(b) of the 1939 Act, 43 U.S.C. § 485f(b), as support for the proposition that any contract executed pursuant to section 9(e) is a repayment contract. Section 7(b) authorizes the Secretary of the Interior to enter into a "repayment contract ... in accordance, as near as may be, with the provisions [of sections 9(d) or 9(e)]" for any project under construction on the effective date of the 1939 Act. In the appellants' view, it would be inconsistent with the text of section 7(b) to hold that 9(d) contracts are repayment contracts but 9(e) contracts are not.

Section 7(b) does not, as the appellants contend, implicitly define the nature of any contracts executed under the authority of sections 9(d) and 9(e). The references to sections 9(d) and 9(e) merely specify the various provisions in the 1939 Act that the Secretary must consider when relying on section 7(b), which constitutes an independent source of the Secretary's authority to enter into a repayment contract. Although section 9(e) generally sets forth the statutory basis for the Secretary's authority to enter into water service contracts, and not repayment contracts, that subsection also provides that:

> In the event such contracts [under section 9(e)] are made for furnishing water for irrigation purposes, the costs of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a project, or supplemental works on a project shall be covered by a repayment contract entered into pursuant to subsection (d) of this section.

43 U.S.C. § 485h(e). In light of that passage, the reference to section 9(e) simply confirms that the Secretary, when using his authority under section 7(b), should use a repayment contract in connection with "irrigation water distribution works," such as canals and laterals, just as section 9(e) directs him to do for such projects generally.

The appellants argue that short-term contracts were already "repayment contracts" under the 1939 Act and that their status as such was unaffected by the 1956 Act, notwithstanding that the later-enacted statute extended a number of repayment-type

benefits to long-term 9(e) contracts. It would be incongruous, however, to attribute to Congress the intent to provide greater benefits to short-term contracts than to longterm contracts. For example, one of the benefits conferred by the 1956 Act is that longterm contracts may be converted to 9(d) contracts "under stated terms and conditions mutually agreeable to the parties." 43 U.S.C. § 485h-1(2). Under the appellants' theory, short-term contracts are entitled to be treated as 9(d) contracts even absent an agreement with the Secretary of Interior. It is clear that in the 1956 Act Congress intended to grant certain benefits to long-term contract holders that were not previously available. Congress's silence on the subject of short-term 9(e) contracts compels the conclusion that those contracts were not intended to have benefits comparable to those of long-term 9(e) contracts, much less those of 9(d) contracts.

In addition to the language of section 9(e) itself, there is ample contextual support in the 1956 Act for the distinction between short-term 9(e) contracts, on the one hand, and 9(d) and long-term 9(e) contracts, on the other. For example, Section 1(4) of the 1956 Act provides in pertinent part

> that the other party to any contract entered into pursuant to [section 9(d)] or to any long-term contract entered into pursuant to [section 9(e)] shall ... have a first right (to which right the rights of the holders of any other type of irrigation water contract shall be subordinate) to a stated share or quantity of the project's available water supply for

> beneficial use on the irrigable lands within the boundaries of, or owned by, the party....

43 U.S.C. § 485h-1(4). Congress clearly contemplated a residual category of "irrigation water contracts" that would not be entitled to the same water rights as 9(d) contracts and long-term 9(e) contracts. In the absence of any specific exclusion for short-term 9(e) contracts, there can be little doubt that short-term 9(e) contracts fall within the category of "irrigation water contracts" that were intended to be treated differently from 9(d) contracts and long-term 9(e) contracts.

The appellants further argue that the distinction between short-term and longterm contracts under section 9(e) mirrors the distinction between "toll-charge" contracts and repayment contracts under section 9(d). The 1939 Act authorized the Secretary of the Interior to provide for a "development period" of up to 10 years before triggering the landowners' repayment obligation under a 9(d) contract. 43 U.S.C. § 485h(d)(1). During the development period, the landowners were expected to pay a "toll charge" for the delivery of project water. *Id.* According to the appellants, the Secretary of the Interior lacks the authority to enter into a short-term 9(e) contract except for the purpose of a development period; they argue that when a short-term 9(e) contract is in place for more than 10 years it must be converted into a long-term 9(e) contract.

While it is true that Congress has chosen 10 years as the maximum allowable duration for both development periods and short-term contracts, that fact standing alone does not justify the inference that

the appellants press upon us. Nothing in either the text or legislative history of the 1939 Act suggests that Congress intended short-term 9(e) contracts to serve only as analogues to the toll-charge contracts authorized under section 9(d) for development periods. We therefore reject the suggestion that the Secretary cannot execute a short-term contract under section 9(e) except for the period authorized for a "development period" toll-charge contract.

The appellants next contend that the United States is collaterally estopped from denying that their contracts are repayment contracts because the Ninth Circuit already decided that issue in *Flint v. United States*, 906 F.2d 471 (9th Cir. 1990). In *Flint*, landowners in the Quincy Basin area challenged the operation and maintenance charges in their water service contracts, which are identical to the contracts at issue in this appeal. The *Flint* court held that: (1) the amounts charged by the Secretary of the Interior were committed to his discretion; (2) the Secretary did not exceed his authority under state law in assessing the charges; and (3) the plaintiffs had no property interest in the artificially stored groundwater that could be taken by the United States. 906 F.2d at 476-77. While the court in *Flint* referred to the contracts as "repayment contracts," there is no indication that the issue of the character of the contracts was briefed by the parties or that the court intended to address that legal issue. Accordingly, we conclude that the question whether the appellants' contracts are repayment contracts was neither litigated nor decided in the prior proceeding and that the court's characterization of

the contracts is therefore not binding on the government in this case. *See, e.g.*, *Killeen v. Office of Pers. Mgmt.*, 558 F.3d 1318, 1323 (Fed. Cir. 2009).

We therefore reject the appellants' argument that their contracts are "repayment contracts," as defined in section 2(e) of the 1939 Act, 43 U.S.C. § 485a(e).

VI

The appellants next argue that even if their contracts do not include an obligation to repay the government's construction costs, the Bureau of Reclamation is constrained by its earlier determination that their contracts are entitled to the statutory benefits reserved for repayment contracts and long-term 9(e) contracts. Because the appellants' assertions in that regard focus on the Bureau's enforcement of excess land limitations, we briefly recount the historical development of those limitations in reclamation law.

As part of a general policy to encourage settlement in the western states, Congress designed the Reclamation Act of 1902 to provide federally subsidized water to small, family-sized farms. To promote that objective, Congress provided in section 5 of the 1902 Act that "[n]o right to the use of water ... shall be sold for a tract exceeding 160 acres to any one landowner." 43 U.S.C. § 431. Congress later directed that project water would be withheld from any lands in excess of 160 acres in single ownership unless the owner executed a recordable contract to

sell excess land at a discount price that did not reflect the appreciation in value attributable to the availability of project water. *Id.* § 423e. Over time, the Bureau of Reclamation came to accept certain practices that were designed to avoid the 160-acre limitation, such as executing recordable contracts under a trust or limited partnership arrangement and increasing the acreage serviced by project water by leasing irrigated property that exceeded 160 acres. *See, e.g.*, *Peterson v. Dep't of the Interior*, 899 F.2d 799, 801-02 (9th Cir. 1990); 4 Robert E. Beck, *Water & Water Rights* 41-19 (1991); Trelease & Gould, *supra*, at 697.

In the Reclamation Reform Act of 1982, Title II of Pub. L. No. 97-293, 96 Stat. 1261, codified at 43 U.S.C. §§ 390aa-390zz ("RRA"), Congress closed several of the loopholes that landowners had previously used, while it also increased the total number of acres, whether owned or leased, to which project water could be delivered on a subsidized, or "non-full cost," basis. Holders of excess lands could nonetheless receive project water if they executed recordable contracts disposing of the excess lands within a reasonable time or if they were willing to pay "full cost" for water delivered to those lands. 43 U.S.C. §§ 390ee, 390ii. The most controversial provision of the RRA was the so-called "hammer clause," which put landowners with existing water supply contracts to a choice: They either had to amend their contracts to conform to the requirements of the RRA or continue to accept project water under their current contracts but pay the government's "full cost" of delivering water to leased lands in excess of

160 acres. *See id.* § 390cc(b); *Peterson*, 899 F.2d at 801.

The appellants point out that the Bureau of Reclamation has repeatedly required them to execute short-term 9(e) contracts incorporating all of the excess land limitations in the RRA and pre-1986 reclamation law. Because those limitations have been enforced against the appellants, they argue that the Bureau has effectively deemed their contracts sufficient to trigger the statutory benefits granted to repayment contracts and long-term 9(e) contracts. The appellants' argument depends on the assumption that the RRA and the pre-1986 excess land limitations apply only to repayment contracts and long-term 9(e) contracts. As we have already decided, however, the appellants' contracts are short-term 9(e) contracts because they have 10-year terms and because they do not contemplate a "general repayment obligation." Thus, the appellants are essentially arguing that the Bureau erred in applying the excess land limitations to their contracts, but that having done so the Bureau must extend to them the benefits of repayment contracts and long-term 9(e) contracts.

We need not decide whether the RRA and pre-1986 excess land limitations apply to short-term 9(e) contracts, because it is clear that applying those provisions to the appellants' contracts did not affect either the 10-year term of their contracts or their obligation to pay a water rental charge. The appellants do not contend that the RRA and pre-1986 excess land limitations require the execution of a repayment contract or a long-term 9(e) contract, at

least where such contracts were not already in effect. Nor do they contend that the excess land statutes grant the Secretary of the Interior discretionary authority to enter into a repayment contract or a long-term 9(e) contract where none existed before. *See, e.g.*, 43 U.S.C. §§ 390cc(d), 390ee(b).

To be sure, both the RRA and pre-1986 excess land laws give rise to legal consequences that depend on the type of contractual arrangement entered into by the parties. By way of example, the RRA applies only to a "repayment or water service contract between the United States and a district providing for the payment of construction charges to the United States including normal operation, maintenance, and replacement costs pursuant to Federal reclamation law." 43 U.S.C. § 390bb(1). Also under the RRA, the ownership and "full cost" limitations cease when "the obligation of a district for the repayment of the construction costs of the project facilities used to make project water available for delivery to such lands shall have been discharged by a district." *Id.* § 390mm(a). However, while the issue the appellants raise may go to what their obligations are under the RRA, that issue does not affect the nature of their contracts with the Bureau of Reclamation.

It may be that the Bureau of Reclamation erred in enforcing the excess land laws against the appellants' contracts. But the appellants have not squarely presented that issue to us, nor did they present it to the district court; it is therefore not before us, and we do not decide that question. *See Novosteel SA v. United States*, 284 F.3d 1261, 1273-74 (Fed. Cir. 2002). Because we are concerned only with

whether the appellants are entitled to the statutory benefits accorded to repayment contracts and long-term 9(e) contracts under the 1939 and 1956 Acts, and because those benefits turn on whether the appellants' contracts include a principal repayment obligation or have a contract term greater than 10 years, it is sufficient to note that the RRA and the pre-1986 excess land limitations do not change the fact that the appellants hold short-term 9(e) contracts.

Accordingly, we affirm the district court's decision granting the government's motion to dismiss the action.

VII

The appellants have also challenged the district court's denial of their motion to strike certain affidavits that were attached as exhibits to the government's opposition to their motions for summary judgment. After granting the government's motion to dismiss, the district court denied "all other pending motions," including the appellants' motion to strike, as moot. Because we affirm the district court's dismissal on the merits, and because the district court did not rely on any of the contested affidavits that were the subject of the motion to strike in connection with the dismissal order, we need not address the appellants' contention that the district court should not have denied their motion or should not have treated it as moot.

Each party shall bear its own costs for this appeal.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CV-06-204-RHW

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT (GCBSID), a Washington municipal corporation; and Williamson Land Company, a Washington Corporation,

v.

UNITED STATES of America; Bureau of Reclamation; Dirk Kempthorne, Secretary of the Interior of the United States of America; William E. Rinne in his individual capacity; William E. Rinne, Acting Commissioner of the Bureau of Reclamation; J. William McDonald in his individual capacity; J. William McDonald, in his capacity as Regional Director of the Pacific Northwest Region of the Bureau of Reclamation.

March 7, 2008.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS; DENYING PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

ROBERT H. WHALEY, Chief Judge.

Before the Court are Plaintiffs' Motion for Partial Summary Judgment Re: Payout and Pricing Entitlements (Ct. Rec. 24); Plaintiffs' Motion for

Partial Summary Judgment: ASGW Irrigator O & M Overpayment Crediting Entitlements (Ct. Rec. 38); and the Federal Defendants' Motion to Dismiss and, alternatively, Motions for Judgment on the Pleadings (Ct. Rec. 76).

A hearing was held on the motions on October 18, 2007, in Spokane, Washington. Plaintiffs were represented by Ronald Ady and Ronald Christensen. Defendants were represented by Rolf Tangvald and Clark Miller.

The briefing on the pending motions is extensive and the issues presented to the Court are complex. At the heart of Plaintiffs argument is that the federal reclamation laws demand that they be treated equitably as compared to other federal reclamation participants. Specifically, Plaintiffs argue that federal law mandates that the Bureau of Reclamation must credit Plaintiffs' payment of construction charges to repayment of project costs; credit Plaintiffs' overpayment of operations and maintenance charges to repayment of project costs; refund any excess operations and maintenance payments made by Plaintiffs and grant certificates of final payment upon payout and certificates of partial release of land use lien restrictions; grant certificate of water rights upon payout of project construction costs; grant management of Plaintiffs' "Artificially Stored Ground Water" ("ASGW") § 9(e) contracts to Grant County Black Sands Irrigation District; and provide low cost power to Plaintiffs. Plaintiffs argue that partial summary judgment in favor of Plaintiffs is appropriate regarding payout and pricing

entitlements and for operation and maintenance overpayment crediting entitlements.

The Federal Defendants argue the Court lacks jurisdiction over Plaintiffs' complaint for three reasons: (1) Plaintiffs' Second Amended Complaint seeks relief under the Administrative Procedure Act (APA) that the Tucker Act, 28 U.S.C. § 1491(a)(1) impliedly forbids (Sovereign Immunity Argument); (2) Plaintiffs' Complaint does not raise a cognizable claim under the APA because it fails to identify any reviewable final agency action and/or fails to identify a final agency action that BOR had a non-discretionary duty to take, but failed to take; and (3) Plaintiffs' claims are not ripe.

BACKGROUND

The background of the Columbia Basin Project, which is the backdrop for this instant action, is set forth in *Flint v. United States*, 906 F.2d 471 (9th Cir. 1990). The Court incorporates the factual background as set forth in that opinion. Plaintiffs in this case are the Grant County Black Sands Irrigation District ("GCBSID"), a Washington municipal corporation, and Plaintiff Williamson Land Company, a landowner who holds section 9(e) contracts with the United States Bureau of Reclamation and pumps from wells for irrigation artificially stored ground water from beneath lands located in the Quincy Basin Ground Water Subarea,

which is within the Grant County Black Sands Irrigation District.[3] The Quincy Basis Ground Water Subarea lies within the boundaries of the Columbia Basin Project. Plaintiffs bring this class action suit on behalf of themselves and similarly situated persons.

There are 292 landowners within the Quincy Subarea that hold license agreements to pump ground water for irrigation. In all, the license agreements account for approximately 56,000 acres of land within the Quincy Subarea. GCBSID members who comprise the purported class Plaintiffs seek to represent include 85 landowners, or 29% of the total landowners within the Quincy Subarea.

DISCUSSION

Plaintiffs have filed two motions for partial summary judgment and the Federal Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b).

A. Standard of Review

Federal Rule of Civil Procedure Rule 12(b)(1) provides for motions to dismiss for lack of subject matter jurisdiction. The burden of proof on a Rule

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[3] Section 9(e) contracts are contracts between the ASGW Irrigators and the Bureau of Reclamation pursuant to 43 U.S.C. § 485(e).

12(b)(1) motion to dismiss is on the party asserting jurisdiction. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L. Ed. 2d 391 (1994). On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court is not "restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

B. Subject Matter Jurisdiction

Defendants argue that the Court does not have subject matter jurisdiction to hear Plaintiff's complaint.

(1) Sovereign Immunity

Defendants argue that the United States has not waived its sovereign immunity with respect to the claims being brought by Plaintiff. "It is well settled that the United States is a sovereign, and as such, is immune from suit unless it has expressly waived such immunity and consented to be sued. Such waiver cannot be implied, but must be unequivocally expressed. Where a suit has not been consented to by the United States, dismissal of the action is required ... [because] the existence of such consent is a prerequisite for jurisdiction." *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1087 (9th Cir. 2007) (*quoting Gilbert v. DaGrossa*, 756 F.2d 1455, 1458

(9th Cir. 1985)). The scope of a waiver of sovereign immunity must be strictly construed in favor of the sovereign. *Id.* Plaintiffs have the burden of establishing that its claims fall within an unequivocally expressed waiver of sovereign immunity by Congress. *Id.* at 1088. Plaintiffs' action must be dismissed if it cannot meet this burden. *Id.*

Plaintiffs assert that they have pled two distinct claims under the Administrative Procedure Act: (1) a section 706(1) claim, which requires the Court to compel the Bureau to act where it has unlawfully withheld agency action; and (2) a section 706(2) claim that the Bureau violated reclamation law when it issued invoices to ASGW irrigators requiring them to pay construction, operation, and maintenance charges for their use of CBP ASGW water.

Section 702 of the APA provides the right for judicial review of agency actions. 5 U.S.C. § 702. Section 706 sets forth the scope of review. 5 U.S.C. § 706. According to the Ninth Circuit, section 702 of the APA waives sovereign immunity for Plaintiffs' claims if (1) the claims are not for money damages; (2) an adequate remedy for the claims is not available elsewhere; and (3) the claims do not seek relief expressly or impliedly forbidden by another statute. *Tucson Airport Authority v. General Dynamics Corp.*, 136 F.3d 641, 644 (9th Cir. 1998).

Defendant argues that the relief sought by Plaintiffs is unavailable under the section 702 waiver of sovereign immunity because the Tucker Act impliedly forbids equitable relief for contract-based claims.

The Tucker Act states:

> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort ...

28 U.S.C. § 1491(a)(1).

Courts have held that neither the Tucker Act nor the Little Tucker Act[4] permit a district court to grant equitable or declaratory relief in a contract dispute case; however, a district court does have jurisdiction to hear claims for equitable relief based on statutory rights. *North Star Alaska v. United States*, 9 F.3d 1430, 1432 (9th Cir. 1993). Whether claims are contractually based for purposes of the Tucker Act depends "on the source of the rights upon which plaintiff bases its claims, and the type of relief sought (or appropriate)." *North Star Alaska v. United States*, 14 F.3d 36, 37 (9th Cir. 1994) (*citing Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967-68 (D.C. Cir. 1982)). Where claims asserted are based on a contract, seek a declaration of contract rights, or do not exist independent of a contract, they are barred by the

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[4] The district court has concurrent jurisdiction with the claims court for actions not exceeding $10,000. 28 U.S.C. § 1346(a)(2). ("Little Tucker Act").

Tucker Act. *Tucson Airport Auth.*, 136 F.3d at 646-47.

The Court finds that the basis for Plaintiffs' claims is statutory, based on the federal reclamation laws. Thus, the Tucker Act does not preclude a section 702 waiver of sovereign immunity. However, before the APA waiver of immunity applies, Plaintiffs must state a valid claim under the APA. *E.J. Friedman Co., Inc. v. United States*, 6 F.3d 1355, 1359 (9th Cir. 1993).

(2) Administrative Procedure Act

Defendants argue that Plaintiffs' complaint does not raise a cognizable claim under the Administrative Procedure Act because it fails to identify a final agency action that the Bureau had a non-discretionary duty to take, but did not take and fails to identify any reviewable final agency action.

Action that is legally required can be compelled under the APA. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63, 124 S.Ct. 2373, 159 L. Ed. 2d 137 (2004) ("Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." (emphasis in original)). On the other hand, if the Bureau is not legally required to take a particular action, the Court does not have jurisdiction to order the Bureau to take action. *Id.*

Plaintiffs argue that the reclamation law strictly limits the Bureau's discretion and have identified the following discrete ministerial acts that the Bureau

has unlawfully withheld: (1) crediting Plaintiffs' payment of construction charges to repayment of project costs; (2) crediting Plaintiffs' over-payment of O & M to repayment of project costs; (3) refunding any excess O & M payments made by Plaintiffs; (4) granting certificates of final payment upon payout and certificates of partial release of land use lien restrictions; (5) granting certificates of water right upon payout of project construction costs; (6) granting management of the Plaintiffs' ASGW 9(e) contracts to Grant County Black Sands Irrigation District; and (7) providing low cost power to Plaintiffs ASGW irrigators. The benefits that Plaintiffs are seeking are found in sections 485h-1-5 of the 1956 Amendments to the federal reclamation laws. 43 U.S.C. § 485h-1-5. Plaintiffs argue that all contracts for ASGW executed pursuant to section 9(e) of the federal reclamation laws are "repayment contracts" subject to the requirements and benefits accorded repayment contracts under Federal Reclamation law, specifically those found in 43 U.S.C. § 485h-1-5.

The problem with this argument is that section 9(e) does not treat all contracts executed pursuant to this section as "repayment contracts." On the contrary, the section specifically refers to either "short- or long-term contracts." Pursuant to section 485h-3, a long-term contract is defined to mean any contract the term of which is more than ten years. Section 485h-1 permits the Secretary to convert long-term section (e) contracts to section (d) contracts. There is nothing in section 485h-1-5 that authorizes the Secretary to convert a short-term (e) contract to a section (d) contract. Likewise, there is nothing in this

section that would authorize the Secretary to provide the benefits Plaintiffs are seeking to short-term contracts. Plaintiffs' interpretation of section 485h(e) is belied by the explicit provisions of section 485h-1-5.

Also, section 9(e) contains no language requiring that the rates set by the Secretary for furnishing water also cover the repayment of construction costs. § 485h(e).

In their motions for summary judgment, Plaintiffs read the following provisions of the reclamation law as strictly limiting the Bureau's discretion to enter into short-term contracts: 16 U.S.C. § 835; 43 U.S.C. §§ 372, 390, 390h, 390dd, 390ee, 390hh, 391, 415, 419, 423e, 431, 461, 469, 470, 485a, 485f(b) 485h(a)-(f), 491-42, 498, 543-45; 43 C.F.R. §§ 426, 426.1, 426.2, 426.5, 426.23. Plaintiffs argue that these sections of Reclamation law require the Bureau to fix an equitable and appropriate construction obligation for the ASGW irrigators to repay or payout through equitable and appropriate allocation of a share of United States construction costs to be reimbursed or repaid, to credit all construction payments made toward payout of that construction obligation, and to end all construction charges when so paid out. The Court has carefully reviewed these provisions, along with Plaintiff's arguments and concludes that collectively, these provisions do not require the Bureau to do what Plaintiffs are asking this Court to order the Bureau to do.

Plaintiffs take issue with the fact that the contracts include a construction charge. Such a charge comports with section 485h(e), which permits

the Secretary to set rates in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation. The rate can include a portion of the cost of construction connected with the water supply and allocated to irrigation. On the other hand, nowhere in the statute does it state that if such a construction charge is assessed, the contract becomes a "repayment" contract or a contract that is covered by 485h-1. Inclusion of the construction charge in the § 9(e) contract does not violated federal reclamation law.

Plaintiff also argue that the reclamation laws demand that they be treated equally at the three districts. The Court disagrees. On the contrary, the reclamation laws provide that the water users be treated differently, depending on the type of contract that is entered into with the users and the Bureau. Moreover, as Defendants point out, there are unique differences between the water districts and the individual license-holders, including their histories, their systems, as well as their entitlements and obligations.

The Court finds that Congress expressly gave the Bureau discretion to enter into short-term contracts to furnish water for irrigation. Plaintiff's arguments to the contrary are without merit. As such, Plaintiffs' claim under § 706(1) fails as a matter of law.

The Court also finds that Plaintiffs have failed to identify any reviewable final agency action and therefore has not stated a cognizable claim under § 706(2). The issuing of invoices do not meet the statutory definition of "agency action." *See Oregon Natural Desert Ass'n v. United States Forest Service*, 465 F.3d 977 (9th Cir. 2006). Nor is the filing of an answer to the complaint filed by Plaintiff GCBSID in the 2003 lawsuit a reviewable final agency action.

Because Plaintiffs have failed to establish a claim under the APA, they are not entitled to an APA waiver of sovereign immunity.

(3) Plaintiff's Remaining Claims

Plaintiffs argue that regardless of whether the APA provides a waiver of sovereign immunity, their claims for quiet title, mandamus, and based on the 1950 Act either provide waivers of sovereign immunity that operate independent of the APA, or require no waiver of sovereign immunity by the United States. Notwithstanding these arguments, the Court finds that Plaintiffs have not shown that the Government has unequivocally waived its sovereign immunity and consented to be sued. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472, 123 S.Ct. 1126, 155 L. Ed. 2d 40 (2003) ("Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity, together with a claim falling within the terms of the waiver. The terms of consent to be sued may not be inferred, but must be

'unequivocally expressed,' in order to 'define a court's jurisdiction.' ") (citations omitted).

(4) Conclusion

Plaintiffs have not met their burden of establishing that Congress has expressly waived the United States' sovereign immunity and consented to be sued with respect to the claims asserted against it in Plaintiffs' Second Amended Complaint. As such, Plaintiffs' action is dismissed.

Accordingly, IT IS HEREBY ORDERED:

1. Federal Defendant's Motion to Dismiss, and, alternatively, Motion for Judgment on the Pleadings (Ct. Rec. 76) is GRANTED.

2. Plaintiffs' Motion for Partial Summary Judgment Re: Payout and Pricing Entitlements (Ct. Rec. 24) is DENIED.

3. Plaintiffs' Motion for Partial Summary Judgment: ASGW Irrigator O & M Overpayment Crediting Entitlements (Ct. Rec. 38) is DENIED.

4. Plaintiffs' Motion to Certify Class (Ct. Rec. 14) is DENIED, as moot.

5. All other pending motions are DENIED, as moot.

6. The above-caption claims asserted against the Federal Defendants are dismissed, with prejudice.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, provide copies to counsel, and close the file.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-1354

GRANT COUNTY BLACK SANDS IRRIGATION DISTRICT (GCBSID) and WILLIAMSON LAND COMPANY,
Plaintiffs-Appellants,

v.

UNITED STATES, BUREAU OF RECLAMATION, KEN SALAZAR, Secretary of the Interior, ROBERT W. JOHNSON, in his capacity as Commissioner of the Bureau of Reclamation, J. WILLIAM MCDONALD, in his individual capacity, and J. WILLIAM MCDONALD, in his capacity as Regional Director of the Pacific Northwest Region of the Bureau of Reclamation,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Washington in case no. 06-CV-204, Chief Judge Robert H. Whaley.

ORDER

A petition for rehearing en banc having been filed by the Appellants, and a response hereto having been invited by the court and filed by the Appellees, and the matter having first been referred as a petition for rehearing to the panel that heard the

appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on February 24, 2010.

FOR THE COURT,
Jan Horbaly
Clerk

Dated: 02/17/2010

STATUTORY APPENDIX

I. Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 390

As amended and codified in Title 43 of the United States Code, the Reclamation Act of 1902 provides, in relevant part:

§ 372. Water right as appurtenant to land and extent of right

The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

§ 383. Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

§ 431. Limitation as to amount of water; qualifications of applicant

No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

§ 461. Determination of construction charges generally

The construction charges which shall be made per acre upon the entries and upon lands in private ownership which may be irrigated by the waters of any irrigation project shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably.

II. Reclamation Act of 1912, Pub. L. No. 62-256, 37 Stat. 265

As amended and codified in Title 43 of the United States Code, the Reclamation Act of 1912 provides, in relevant part:

§ 541. When patent or final certificate issued

Any homestead entryman under the Act of June 17, 1902, known as the reclamation Act, including entrymen on ceded Indian lands, may, at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation, and cultivation, submit proof of such residence, reclamation, and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent, and all purchasers of water-right certificates on reclamation projects shall be entitled to a final water-right certificate upon proof of the cultivation and reclamation of the land to which the certificate applies, to the extent required by the reclamation Act for homestead entrymen: Provided, That no such patent or final water-right certificate shall issue until after the payment of all sums due the United States on account of such land or water right at the time of the submission of proof entitling the homestead or desert-land entryman to such patent or the purchaser to such final water-right certificate.

§ 542. Reservation of lien for charges; enforcement of lien; redemption

Every patent and water-right certificate issued under this subchapter shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims, or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water rights. * * * *

§ 543. Certificate of final payment and release of lien

Upon full and final payment being made of all amounts due on account of the building and betterment charges to the United States or its successors in control of the project, the United States or its successors, as the case may be, shall issue upon request a certificate certifying that payment of the building and betterment charges in full has been made and that the lien upon the land has been so far satisfied and is no longer of any force or effect except the lien for annual charges for operation and maintenance.

III. Reclamation Project Act of 1939, Pub. L. No. 76-260, 53 Stat. 1187

As amended and codified in Title 43 of the United States Code, the Reclamation Act of 1939 provides, in relevant part:

§ 485. Declaration of policy

For the purpose of providing for United States reclamation projects a feasible and comprehensive plan for an economical and equitable treatment of repayment problems and for variable payments of construction charges which can be met regularly and fully from year to year during periods of decline in agricultural income and unsatisfactory conditions of agriculture as well as during periods of prosperity and good prices for agricultural products, and which will protect adequately the financial interest of the United States in said projects, obligations to pay construction charges may be revised or undertaken pursuant to the provisions of this subchapter.

§ 485a. Definitions

* * * *

(d) The term "construction charges" shall mean the amounts of principal obligations payable to the United States under water-right applications, repayment contracts, orders of the Secretary, or other forms of obligation entered into pursuant to the Federal reclamation laws, excepting amounts payable for water rental or power charges, operation and

maintenance and other yearly service charges, and excepting also any other operation and maintenance, interest, or other charges which are not covered into the principal sums of the construction accounts of the Bureau of Reclamation.

(e) The term "repayment contract" shall mean any contract providing for payment of construction charges to the United States.

§ 485h. New projects; sale of water and electric power; lease of power privileges

* * * *

(d) Delivery of water for irrigation; repayment contract prerequisites

No water may be delivered for irrigation of lands in connection with any new project, new division of a project, or supplemental works on a project until an organization, satisfactory in form and powers to the Secretary, has entered into a repayment contract with the United States, in a form satisfactory to the Secretary, providing among other things—

(1) That the Secretary may fix a development period for each irrigation block, if any, of not to exceed ten years from and including the first calendar year in which water is delivered for the lands in said block; and that during the development period water shall be delivered to the lands in the irrigation block involved at a charge per annum per acre-foot, or other charge, to be fixed by the Secretary each year and to be paid in advance of delivery of water: Provided, That where the lands included in an irrigation block are for the most part lands owned by

the United States, the Secretary, prior to execution of a repayment contract, may fix a development period, but in such case execution of such a contract shall be a condition precedent to delivery of water after the close of the development period: Provided further, That when the Secretary, by contract or by notice given thereunder, shall have fixed a development period of less than ten years, and at any time thereafter but before commencement of the repayment period conditions arise which in the judgment of the Secretary would have justified the fixing of a longer period, he may amend such contract or notice to extend such development period to a date not to exceed ten years from its commencement, and in a case where no development period was provided, he may amend such contract within the same limits: Provided further, That when the Secretary shall have deferred the payment of all or any part of any installments of construction charges under any repayment contract pursuant to the authority of the Act of September 21, 1959 (73 Stat. 584), he may, at any time prior to the due date prescribed for the first installment not reduced by such deferment, and by agreement with the contracting organization, terminate the supplemental contract by which such deferment was effected, credit the construction payments made, and exercise the authority granted in this section. After the close of the development period, any such charges collected and which the Secretary determines to be in excess of the cost of the operation and maintenance during the development period shall be credited to the construction cost of the project in the manner determined by the Secretary.

(2) That the part of the construction costs allocated by the Secretary to irrigation shall be included in a general repayment obligation of the organization; and that the organization may vary its distribution of construction charges in a manner that takes into account the productivity of the various classes of lands and the benefits accruing to the lands by reason of the construction: Provided, That no distribution of construction charges over the lands included in the organization shall in any manner be deemed to relieve the organization or any party or any land therein of the organization's general obligation to the United States.

(3) That the general repayment obligation of the organization shall be spread in annual installments, of the number and amounts fixed by the Secretary, over a period of not more than 40 years, exclusive of any development period fixed under paragraph (1) of this subsection, for any project contract unit or, if the project contract unit be divided into two or more irrigation blocks, for any such block, or as near to said period of not more than forty years as is consistent with the adoption and operation of a variable payment formula which, being based on full repayment within such period under average conditions, permits variance in the required annual payments in the light of economic factors pertinent to the ability of the organization to pay.

(4) That the first annual installment for any project contract unit, or for any irrigation block, as the case may be, shall accrue, on the date fixed by the Secretary, in the year after the last year of the development period or, if there be no development

period, in the calendar year after the Secretary announces that the construction contemplated in the repayment contract is substantially completed or is advanced to a point where delivery of water can be made to substantially all of the lands in said unit or block to be irrigated; and if there be no development period fixed, that prior to and including the year in which the Secretary makes said announcement water shall be delivered only on the toll charge basis hereinbefore provided for development periods.

(e) Contracts to furnish water

In lieu of entering into a repayment contract pursuant to the provisions of subsection (d) of this section to cover that part of the cost of the construction of works connected with water supply and allocated to irrigation, the Secretary, in his discretion, may enter into either short- or long-term contracts to furnish water for irrigation purposes. Each such contract shall be for such period, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper, due consideration being given to that part of the cost of construction of works connected with water supply and allocated to irrigation; and shall require payment of said rates each year in advance of delivery of water for said year. In the event such contracts are made for furnishing water for irrigation purposes, the costs of any irrigation water distribution works constructed by the United States in connection with the new project, new division of a

project, or supplemental works on a project, shall be covered by a repayment contract entered into pursuant to subsection (d) of this section.

§ 485j. Effect on existing laws

The provisions of previous Acts of Congress not inconsistent with the provisions of this subchapter shall remain in full force and effect.

IV. Reclamation Act of 1956, Pub. L. No. 84-643, 70 Stat. 483

As amended and codified in Title 43 of the United States Code, the Reclamation Act of 1956 provides, in relevant part:

§ 485h-1. Administration of repayment contracts and long-term contracts to furnish water; renewal and conversion; credit for payments; right to available water supply; rates; construction component

In administering subsections (d) and (e) of section 485h of this title, the Secretary of the Interior shall--

(1) include in any long-term contract hereafter entered into under subsection (e) of section 485h of this title provision, if the other contracting party so requests, for renewal thereof under stated terms and conditions mutually agreeable to the parties. Such terms and conditions shall provide for an increase or decrease in the charges set forth in the contract to reflect, among other things, increases or decreases in construction, operation, and maintenance costs and improvement or deterioration in the party's repayment capacity. Any right of renewal shall be exercised within such reasonable time prior to the expiration of the contract as the parties shall have agreed upon and set forth therein;

(2) include in any long-term contract hereafter entered into under subsection (e) of section 485h of this title with a contracting organization provision, if the organization so requests, for conversion of said

contract, under stated terms and conditions mutually agreeable to the parties, to a contract under subsection (d) of section 485h of this title at such time as, account being taken of the amount credited to return by the organization as hereinafter provided, the remaining amount of construction cost which is properly assignable for ultimate return by it can probably be repaid to the United States within the term of a contract under subsection (d) of section 485h of this title;

(3) credit each year to every party which has entered into or which shall enter into a long-term contract pursuant to subsection (e) of section 485h of this title so much of the amount paid by said party on or before the due date as is in excess of the share of the operation and maintenance costs of the project which the Secretary finds is properly chargeable to that party. Credit for payments heretofore made under any such contract shall be established by the Secretary as soon after July 2, 1956 as it is feasible for him to do so. After the sum of such credits is equal to the amount which would have been for repayment by the party if a repayment contract under subsection (d) of section 485h of this title had been entered into, which amount shall be established by the Secretary upon completion of the project concerned or as far in advance thereof as is feasible, no construction component shall be included in any charges made for the furnishing of water to the contracting party and any charges theretofore fixed by contract or otherwise shall be reduced accordingly;

(4) provide that the other party to any contract entered into pursuant to subsection (d) of section

485h of this title or to any long-term contract entered into pursuant to subsection (e) of section 485h of this title shall, during the term of the contract and of any renewal thereof and subject to fulfillment of all obligations thereunder, have a first right (to which right the rights of the holders of any other type of irrigation water contract shall be subordinate) to a stated share or quantity of the project's available water supply for beneficial use on the irrigable lands within the boundaries of, or owned by, the party and a permanent right to such share or quantity upon completion of payment of the amount assigned for ultimate return by the party subject to payment of an appropriate share of such costs, if any, as may thereafter be incurred by the United States in its operation and maintenance of the project works; and

(5) Provide for payment of rates under any contract entered into pursuant to said subsection (e) in advance of delivery of water on an annual, semiannual, bimonthly, or monthly basis as specified in the contract.

(6) include a reasonable construction component in the rates set out in any long-term contract hereafter entered into under subsection (e) of section 485h of this title prior to amortization of that part of the cost of constructing the project which is assigned to be repaid by the contracting party.

§ 485h-3. "Long-term contract" defined

As used in sections 485h-1 to 485h-5 of this title, the term "long-term contract" shall mean any contract the term of which is more than ten years.

§ 485h-4. Application of State laws

Nothing in sections 485h-1 to 485h-5 of this title shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of such sections shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

§ 485h-5. Supplement to Federal reclamation laws

Sections 485h-1 to 485h-5 of this title shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

V. Reclamation Reform Act of 1982, Pub. L. No. 97-293, 96 Stat. 1261

As amended and codified in Title 43 of the United States Code, the Reclamation Reform Act of 1982 provides, in relevant part:

§ 390bb. Definitions

As used in this subchapter:

(1) The term "contract" means any repayment or water service contract between the United States and a district providing for the payment of construction charges to the United States including normal operation, maintenance, and replacement costs pursuant to Federal reclamation law.

§ 390cc. New or amended contracts

(a) Generally

The provisions of this subchapter shall be applicable to any district which--

(1) enters into a contract with the Secretary subsequent to October 12, 1982;

(2) enters into any amendment of its contract with the Secretary subsequent to October 12, 1982, which enables the district to receive supplemental or additional benefits; or

(3) which amends its contract for the purpose of conforming to the provisions of this subchapter. * * * *

§ 390dd. Limitation on ownership

Except as provided in section 390ii of this title, irrigation water may not be delivered to—

(1) a qualified recipient for use in the irrigation of lands owned by such qualified recipient in excess of nine hundred and sixty acres of class I lands or the equivalent thereof; or

(2) a limited recipient for the use in the irrigation of lands owned by such limited recipient in excess of six hundred and forty acres of class I lands or the equivalent thereof;

whether situated in one or more districts.

§ 390ee. Pricing

(a) Delivery of irrigation water at full cost

Notwithstanding any other provision of law, any contract with a district entered into by the Secretary as specified in section 390cc of this title, shall provide for the delivery of irrigation water at full cost as defined in section 390bb(3) of this title to:

(1) a landholding in excess of nine hundred and sixty acres of class I lands or the equivalent thereof for a qualified recipient,

(2) a landholding in excess of three hundred and twenty acres of class I land or the equivalent thereof for a limited recipient receiving irrigation water on or before October 1, 1981; and

(3) the entire landholding of a limited recipient not receiving irrigation water on or before October 1, 1981 * * * *.

§ 390mm. Repayment of construction charges

(a) Ownership and pricing limitations inapplicable when repayment obligation has been discharged

The ownership and full cost pricing limitations of this subchapter and the ownership limitations provided in any other provision of Federal reclamation law shall not apply to lands in a district after the obligation of a district for the repayment of the construction costs of the project facilities used to make project water available for delivery to such lands shall have been discharged by a district (or by a person within the district pursuant to a contract existing on October 12, 1982), by payment of periodic installments throughout a specified contract term, including individual or district accelerated payments where so provided in contracts existing on October 12, 1982. * * * *

§ 390ww. Administrative provisions

(a) Existing Federal reclamation law

The provisions of Federal reclamation law shall remain in full force and effect, except to the extent such law is amended by, or is inconsistent with, this subchapter. * * * *